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No. 91-1006

In the Supreme Court of the United States

OCTOBER TERM, 1991

U.S. MARINE CORPORATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, upon finding that a successor employer has unlawfully refused to hire 34 of the predecessor's employees in order to evade a bargaining obligation with the union, may order as a remedy the reinstatement of the predecessor's terms and conditions of employment until the successor bargains in good faith with the union to agreement or impasse.

2. Whether substantial evidence supports the Board's finding that the successor employer violated Section 8(a)(3) of the National Labor Relations Act by refusing to hire 34 of the predecessor's employees in order to evade a bargaining obligation with the union.

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OPINIONS BELOW

The opinion of the court of appeals, sitting en banc, Pet. App. 1a-60a, is reported at 944 F.2d 1305. The decision and order of the National Labor Relations Board, Pet. App. 61a-159a, which includes the decision of the administrative law judge, is reported at 293 N.L.R.B. 669.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 1991. The petition for a writ of certiorari was filed on December 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case grows out of the acquisition by petitioner U.S. Marine Corp. of the Hartford, Wisconsin, manufacturing plant that was previously owned by Chrysler Marine Corporation (Chrysler), a subsidiary of Chrysler Corporation.[1] From 1965 until 1984, Chrysler used the Hartford plant to manufacture marine and industrial engines. During that time, the plant's production and maintenance employees were represented by the Allied Industrial Workers of America (Union). In 1983, Chrysler agreed to sell the plant to U.S. Marine. U.S. Marine assigned James Hoag to be general manager of the plant with responsibility for hiring employees. Pet. App. 3a-4a.

During negotiations for the sale of the Hartford plant, U.S. Marine stated to Chrysler that it would neither recognize the Union nor follow the terms of the existing collective bargaining agreement.[2] Instead, U.S. Marine intended to apply its own wage plan and working conditions to the employees, although it intended to encourage former Chrysler employees to apply and anticipated hiring at least 85% of them. U.S. Marine also said to Union representatives that it "had no intention of recognizing the union," "wanted no part of the [collective bargaining] contract," and was "too busy" to meet with the Union. Pet. App. 4a.

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[1] The transaction was negotiated between petitioner Bayliner Marine Corp. and Chrysler; U.S. Marine was then organized, with the same owners and officers as Bayliner, as the vehicle for acquiring the plant. Pet. App. 3a & n.2. In this opposition, we will refer to both petitioners as "U.S. Marine."

[2] The most recent collective bargaining agreement between the Union and Chrysler was in effect from July 1, 1983, to June 30, 1984. Pet. App. 4a n.3.

After the sale was consummated in January 1984, Chrysler laid off its former work force of 262 production and maintenance employees. Nearly all of them applied to U.S. Marine. U.S. Marine's accounting department concluded that the plant would need 396 employees by June. Because U.S. Marine desired to resume operations promptly, it reopened on January 23 with 219 employees, all of whom were former Chrysler employees. By January 25, U.S. Marine had hired 231 employees, 222 of whom were former Chrysler employees. By January 30, the last day on which U.S. Marine hired a former Chrysler employee, it had hired 261 production and maintenance employees, 223 of whom were former Chrysler employees. Pet. App. 6a-7a & n.4.

Thirty-four of the former Chrysler employees who had applied to U.S. Marine were not hired. Those employees were skilled and versatile in working in various jobs in the plant, had years of experience, and had work records comparable to the former Chrysler employees who were hired. U.S. Marine never informed those applicants why they were not hired, but continued to hire other employees, eventually attaining total employment of about 323 employees. Pet. App. 7a, 22a.

On January 25, two days after the plant reopened, the Union requested recognition. At that time, 222 of U.S. Marine's 231 employees were former Chrysler employees. U.S. Marine did not immediately respond to the Union's request. Several days later, however, James Hoag personally increased the projected complement of employees to be hired to 460 workers. This increase was purportedly required by greater production quotas for May and June, the basis for which Hoag was never able to explain, and by higher

assumed absentee rates, which reflected vacation allowances that the Chrysler employees (but not the U.S. Marine employees) would have had. Using the inflated projection, the number of former Chrysler employees that U.S. Marine had hired constituted less than a majority of the employees that U.S. Marine anticipated hiring. The increased projection therefore served to support a sham claim by U.S. Marine that it was not obligated to recognize the Union. Pet. App. 8a-9a, 14a, 23a-25a.[3]

2. By February 2, 1984, U.S. Marine had still failed to respond to the Union's request for recognition. The Union therefore filed an unfair labor practice charge with the Board, alleging that U.S. Marine had unlawfully refused to bargain with the Union, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1).[4] A complaint issued and the Board sought a temporary injunction in district court pur-

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[3] When a successor firm continues substantially the same business as its predecessor and when a majority of the staff hired by the new employer formerly worked for the predecessor, the successor has a duty to recognize and bargain with the union that represented those employees. *NLRB* v. *Burns Int'l Security Services, Inc.*, 406 U.S. 272, 281 (1972); *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 36-41 (1987). The successor's obligation to bargain is determined at the time that it has hired a "substantial and representative" complement of its anticipated workforce. *Fall River*, 482 U.S. at 47-52.

[4] Section 8(a)(5), 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce" the exercise of rights protected by Section 7 of the Act, 29 U.S.C. 157.

suant to Section 10(j) of the Act, 29 U.S.C. 160(j), requiring U.S. Marine to fulfill its bargaining obligations. Pet. App. 9a.

U.S. Marine defended against the Section 10(j) action by denying that it had any obligation to recognize the Union; it asserted that, because its full complement of employees would consist of 460 workers, the former Chrysler employees would not constitute a majority of its work force. Rejecting that contention, the district court granted an injunction ordering U.S. Marine to recognize and bargain with the Union, and to furnish it with requested information. Pet. App. 9a-10a. Nevertheless, U.S. Marine continued to meet with a committee of employees to discuss working conditions without the Union, an action for which it was held in contempt of the injunction. See *Szabo* v. *U.S. Marine Corp.*, 819 F.2d 714 (7th Cir. 1987). U.S. Marine also frustrated negotiations with the Union by declaring, after about six months of negotiations, that the parties were at an impasse even though U.S. Marine had made only a single contract proposal to the Union, which the Union had rejected while requesting further talks. In January 1985, U.S. Marine unilaterally implemented the contract that the Union had rejected. Pet. App. 10a.

3. The administrative law judge (ALJ) determined that U.S. Marine had violated Section 8(a)(5) by refusing to recognize the Union, furnish it with information, and bargain in good faith; by unilaterally implementing changes in employment terms without good faith bargaining; and by bargaining with the employees without the Union. Pet. App. 11a, 153a. The ALJ rejected the charge that U.S. Marine had violated Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), by discriminatorily refusing to hire 34

of the former Chrysler employees.[5] Pet. App. 11a-12a, 126a-133a.

The Board affirmed the ALJ's finding of a violation of Section 8(a)(5). Pet. App. 62a. The Board, however, also determined that U.S. Marine had violated Section 8(a)(3) in discriminatorily failing to hire the 34 Chrysler employees. The Board found that Hoag had falsely inflated the employment projections at U.S. Marine to 460 employees for the purpose of evading U.S. Marine's bargaining obligation,[6] and that it was "integral" to U.S. Marine's scheme to avoid its bargaining obligation that Hoag failed to hire the 34 Chrysler employees. Pet. App. 69a. The Board explained that U.S. Marine intended to rely on Hoag's falsified employment projection to justify a claim that its former Chrysler employees did not constitute a majority of its work force; if the 34 additional former employees had been hired, U.S. Marine would have been unable to sustain its claim

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[5] Section 8(a)(3) makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3). It is well settled that, although a new employer is not obligated to rehire the existing work force, the employer violates Section 8(a)(3) when it refuses to hire the former employees in order to avoid having to recognize the union that represented them. *Fall River*, 482 U.S. at 40-41; *Howard Johnson Co.* v. *Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 262 n.8 (1974); *Burns*, 406 U.S. at 280 n.5.

[6] "For reasons fully supported by the record, the judge found that this 460 figure was false and misleading, and had been developed by Hoag shortly after January 31 to furnish a mathematical basis for a defense to the Union's bargaining claim." Pet. App. 64a.

under its sham estimate of the total work force.[7] The Board concluded that the General Counsel had established a "strong prima facie case" that the failure to hire the 34 employees was discriminatorily motivated, and that U.S. Marine failed to carry its burden to prove that it would not have hired those employees apart from its scheme to avoid bargaining with the Union.[8] Pet. App. 66a.

The Board then turned to the issue of remedy. Under *NLRB* v. *Burns Int'l Security Services, Inc.* 406 U.S. 272 (1972), the Board recognized that "a successor employer is ordinarily free to set initial employment terms, without preliminary bargaining with the incumbent union." Pet. App. 70a. But when " 'it is perfectly clear that the new employer plans to retain all of the employees in the unit,' the successor must consult the union before altering the terms and conditions of employment." *Id.* at 70a-71a, quoting *Burns*, 406 U.S. at 294-295. Because U.S. Marine had refused to hire the 34 employees based on its

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[7] "Hoag's fabrication of the 460 employment projection figure made it imperative that U.S. Marine hire no more than 230 Chrysler employees," Pet. App. 69a, and the remaining 34 Chrysler employees fell victim to that need, because U.S. Marine had already hired 223 former Chrysler employees. *Ibid.*

[8] "The record clearly establishes [U.S. Marine's] animus and discriminatory intent, which appeared even before [U.S. Marine] assumed the Chrysler operations and continued through the bargaining that followed as a result of the district court's injunction. * * * In addition, [U.S. Marine has] advanced no legitimate reasons for the refusal to hire the 34 former Chrysler employees. The record shows that all the employees who were not hired were good employees, had exemplary work records, and were versatile and skilled in various jobs in the plant." Pet. App. 67a-68a.

discriminatory motive to avoid a bargaining obligation, the Board concluded that "absent the[] unlawful purpose, [U.S Marine] would have retained substantially all of the predecessor's employees." Pet. App. 71a. Accordingly, the Board found that U.S. Marine was not entitled to set initial terms without first consulting the Union. *Id.* at 72a. As a remedy, the Board required U.S. Marine to restore the predecessor's terms and conditions of employment. *Id.* at 70a.[9] In so doing, the Board relied on the established principle that "in cases involving discriminatory conduct, the restoration of the status quo ante is a necessary remedy as it is the Board's policy that the wrongdoer, rather than the innocent victim, should bear the hardships of the unlawful action." *Id.* at 72a.[10]

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[9] Specifically, the Board ordered that U.S. Marine:

> On request of the Union, rescind any departures from terms and conditions of employment that existed immediately before [U.S. Marine's] takeover from Chrysler * * * of the Hartford * * * operations, retroactively restoring preexisting terms and conditions of employment, including wage rates and benefit plans, and make the employees whole by remitting all wages and benefits that would have been paid absent such unilateral changes from January 23, 1984, until [U.S. Marine] negotiate[s] in good faith with the Union to agreement or to impasse.

Pet. App. 77a. The order does not require, however, "rescission of any wage increase or other benefits that previously have been granted the unit employees." *Id.* at 70a n.6.

[10] The Board's order also required U.S. Marine to recognize and bargain with the Union; to offer immediate reinstatement to the discriminatees; to make employees whole for any losses suffered by reason of the discrimination; and to post a Board-prescribed notice at the plant describing U.S. Marine's obligations. Pet. App. 76a-79a.

4. The court of appeals, sitting en banc, enforced the Board's order. Because U.S. Marine did not contest that it had violated Section 8(a)(5) and (1) by failing to bargain, the court summarily enforced that aspect of the Board's order. Pet. App. 17a-18a. The court of appeals also unanimously enforced the Board's order that U.S. Marine had engaged in unlawful discrimination, in violation of Section 8(a)(3), in refusing to hire the 34 former Chrysler employees. Pet. App. 19a-29a.

On the issue of remedy, the court of appeals enforced the Board's order by a 6-5 vote. The majority concluded that the Board had properly ordered U.S. Marine to reinstate the conditions of employment in effect under Chrysler, "in order to restore the situation to what it would have been absent U.S. Marine's unlawful conduct." Pet. App. 33a. The court of appeals explained that "[b]ut for its unlawful conduct, U.S. Marine would have hired substantially all of Chrysler's employees and therefore would have been obligated to consult with the Union before setting the terms and conditions of employment." *Ibid.*, quoting *Burns*, 406 U.S. at 294-295. The court rejected U.S. Marine's arguments (1) that it was never "perfectly clear" that, absent discrimination, U.S. Marine would have hired the entire former Chrysler work force (Pet. App. 34a); (2) that, even if U.S. Marine had intended to hire the entire work force, it was nevertheless entitled unilaterally to impose its own terms under *Spruce Up Corp.*, 209 N.L.R.B. 194 (1974), enforced, 529 F.2d 516 (4th Cir. 1975) (Table) (Pet. App. 34a-35a);[11] (3) and that the Board's order was

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[11] In *Spruce Up*, the Board considered the situation in which the successor employer, before or at the same time as it offered

punitive rather than remedial (*id.* at 36a-39a).[12]

Judge Easterbrook, writing for the dissent, agreed with the majority that "[s]ubstantial evidence supports the Board's conclusion that U.S. Marine did what it thought expedient to evade its obligation to bargain collectively with its workers." Pet. App. 51a. He concluded, however, that the remedy in this case was punitive. Judge Easterbrook stated that because U.S. Marine would have been entitled to set its own initial terms even if it had avowedly set out to hire all of Chrysler's employees, the Board may not impose a remedy that denies U.S. Marine that right merely upon a finding that U.S. Marine had discriminated against certain employees to avoid incurring a later bargaining obligation. Pet. App. 52a-60a.[13]

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jobs to the predecessor's work force, announces that the offer is made on new terms. In that setting, the Board found, it is not "perfectly clear" that the successor will hire all of the prior work force (as some or all may refuse the new terms), and, accordingly, there is no duty to consult with the union before the employer sets those terms. 209 N.L.R.B. at 195. The court of appeals explained that *Spruce Up* is inapplicable here because U.S. Mairne had discriminatorily "refuse[d] unlawfully to hire its predecessor's employees in order to avoid having to recognize and bargain with the union." Pet. App. 35a.

[12] The court explained that it is well settled that the remedy for discrimination is restoration of the *status quo ante*; the difficulty in this case is in determining what the situation would have been had U.S. Marine not relied on a discriminatory scheme to avoid an obligation to bargain with the Union. That uncertainty should be resolved against U.S. Marine, since it was "the employer's conduct [that] has confused the situation." Pet. App. 38a-39a.

[13] The court of appeals and Justice Stevens denied petitioners' request for a stay pending the filing of a certiorari

ARGUMENT

1. Petitioners contend (Pet. 16-27) that the court of appeals' decision requiring U.S. Marine to restore Chrysler's terms and conditions of employment is inconsistent with this Court's decision in *Burns*, conflicts with the decision of other circuits, and represents an impediment to the takeover of failing businesses. Those contentions lack merit.

a. In *Burns*, this Court held that a successor is ordinarily free to establish its initial terms and conditions of employment without bargaining with the union. The rule reflects the fact that, in the usual case, it will not be known whether the new company will hire a majority of its employee complement from the predecessor's work force until the employees are actually retained. The Court indicated, however, that an exception to that rule may exist in cases when "it is perfectly clear that the new employer plans to retain all of the employees in the unit"; in that setting, it may "be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294-295; *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 47 n.14 (1987).

The Court did not have occasion to explain in *Burns* the situations in which the "perfectly clear" exception would apply. Since then, the Board and the courts have sought to develop rules for applying the

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petition. See App. B to Application to Stay the Judgment Pending Certiorari, filed by petitioners in this Court, No. A-382 (denied Dec. 10, 1991) (Stevens, J., in chambers). The court of appeals stated that "after thorough en banc consideration, [the court] has determined that there is no division among the circuits on the issue appellants intend to present in their petition." *Id.* at 2.

Burns exception.[14] This case, however, does not involve the application of the *Burns* rule or its exception. Here, the Board faced the quite different issue of what *remedy* is appropriate when a successor has discriminatorily refused to hire employees in order to evade a bargaining obligation. That issue is distinct from the question of what rights a new employer would have in the absence of discriminatory refusals to hire in order to evade a bargaining obligation.

The courts of appeals have consistently upheld the Board's position that, when a firm has engaged in discrimination to avoid its successorship obligation, the Board may appropriately remedy that violation by requiring the successor to reinstate the predecessor's terms and conditions of employment. See Pet. App. 31a-34a; *Systems Management, Inc.* v. *NLRB*, 901 F.2d 297, 306-307 (3d Cir. 1990); *American Press, Inc.* v. *NLRB*, 833 F.2d 621, 624-625 (6th Cir. 1987); *Kallmann* v. *NLRB*, 640 F.2d 1094, 1102-1103 (9th Cir. 1981).[15] The purpose of such a remedy is not a punitive one, but is to restore the situation, to the extent possible, to the one that would have prevailed but for the violation. *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941).

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[14] For example, the Board's *Spruce Up* rule (see note 11, *supra*) reflects one aspect of the Board's interpretation of the *Burns* exception. That rule, however, does not address the situation presented here, involving discriminatory refusals to hire.

[15] In *Kallmann*, the court agreed with the Board that "the employer should not be permitted to benefit from his illegal conduct" and therefore may be required retroactively to apply the predecessor's terms. It disagreed only with the "extent" of the remedy ordered in that case. 640 F.2d at 1103 (holding that the prior terms should not apply "beyond a period allowing for a reasonable time of bargaining"). Petitioners have never made such a claim in this case.

When an employer has sought to circumvent bargaining by discriminatorily refusing to hire the former company's employees, the employer has made it impossible to determine precisely what terms and conditions would have been established had the employer bargained with the union. The Board's response to the discrimination is to restore, as the *status quo ante*, the predecessor's terms and conditions in order to set a base line for the award of back pay and other make-whole relief, and to enable the future bargaining to occur under conditions which approximate those that would have existed had there been no discrimination and the old work force, through its union, had commenced negotiations with the employer. While the Board's make-whole remedy must estimate the situation that would have occurred without unlawful conduct, "any uncertainty about what [the new employer] would have done absent its unlawful purpose must be resolved against [it], because it cannot be permitted to benefit from its unlawful conduct." *American Press, Inc.*, 280 N.L.R.B. 937, 938 (1986), enforced, 833 F.2d 621 (6th Cir. 1987).

The dissenting opinion in the court of appeals acknowledged that "the Board could resolve against U.S. Marine all factual ambiguities created by its illegal conduct." Pet. App. 55a. The dissent simply believed that, on the facts of this case, it was clear that U.S. Marine's employees would not have been offered Chrysler's terms of employment even if U.S. Marine had acted lawfully and had not discriminated against former Chrysler employees. The Board, however, made no such finding, nor is there evidence in the record that would compel such a finding.[16] Cf.

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[16] Judge Easterbrook claimed that, even if U.S. Marine had not discriminated, the initial terms of employment "still would have been those U.S. Marine set, not those Chrysler set"; and

INS v. *Zacarias*, No. 90-1342 (Jan. 22, 1992), slip. op. 3, 6 (substantial evidence inquiry means that an agency decision cannot be set aside unless the evidence is "so compelling that no reasonable factfinder could fail to find" facts other than those found by the agency). In light of the Board's broad discretion to draw inferences from the record and to fashion remedies for unfair labor practices, there is no basis for overturning its general approach in this class of cases. See *Virginia Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 539-540 (1943) (fashioning of remedies is "for the Board not the courts to determine" and Board's order must stand unless it represents "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act"); *Shepard* v. *NLRB*, 459 U.S. 344, 349 (1983); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969).[17]

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even with bargaining, "[i]t is unimaginable that U.S. Marine would have agreed to use [Chrysler's] terms." Pet. App. 58a. The Board, however, had to select *some* terms of employment to apply in framing a retrospective remedy, and it was not required to speculate that, even if U.S. Marine had recognized its bargaining obligation, it would have set the same initial terms for the former Chrysler employees as it did in reliance on its discriminatory scheme. Nor was the Board required to invent a hypothetical set of compromise terms that would have been adopted if U.S. Marine had not violated the law. Instead, the Board reasonably resolved the uncertainty against the employer in order "to prevent U.S. Marine from taking advantage of its wrongdoing to the detriment of the employees." *Id.* at 38a.

[17] Judge Easterbrook thought that the Board's statement that U.S. Marine had "forfeited any right [it] may have had as a successor to impose initial terms," Pet. App. 72a, revealed that the Board's make-whole order was actually a "penalty," rather than a "remedy." *Id.* at 57a. The Board's statement,

b. The cases cited by petitioners (Pet. 18-26) do not conflict with the Board's approach in discrimination cases because petitioners' cases do not involve employers who engaged in discrimination in order to evade a duty to recognize the union. For example, in *Nazareth Regional High School* v. *NLRB*, 549 F.2d 873, 881 (2d Cir. 1977), the Board found an unlawful failure to bargain under Section 8(a)(5). The court of appeals determined that, because the successor in that case had never "promised re-employment on the existing terms," there was no duty to bargain over initial terms; the court accordingly found that the employer had not violated Section 8(a)(5) in unilaterally imposing initial terms of employment. Unlike petitioners, however, the employer in *Nazareth* had not set initial terms while simultaneously engaging in a discriminatory scheme designed to evade recognition of the union, and was not subject to a remedy for that violation of Section 8(a)(3). *Nazareth*, therefore, did not address the issue presented here.[18]

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however, simply meant that since U.S. Marine's unlawful conduct had made it impossible to determine what terms would have been offered to the Chryler employees if U.S. Marine had not practiced an illegal scheme to avoid a bargaining obligation with the Union, it was necessary to return to the *status quo ante* and send the parties to the bargaining table. This is the way the majority understood the Board's approach. *Id.* at 38a ("[R]estoration of the previously existing employment terms, the *status quo ante*, is an appropriate remedy," although "imprecise because it must estimate to some degree the situation that would have occurred if there had been no discrimination. * * * A return to the *status quo ante* at least allows the bargaining process to get underway.").

[18] Petitioners misleadingly suggest (Pet. 23 n.9) that *Nazareth* involved a claim of discrimination which makes it similar to this case. In *Nazareth*, the court of appeals *rejected*

The same is true of the Second Circuit's later decision in *Saks & Co.* v. *NLRB*, 634 F.2d 681, 687 (1980). That case refined the court's analysis of when the *Burns* "perfectly clear" exception can apply, but, as the court of appeals in this case noted, in *Saks*, as in *Nazareth*, the Board did not "find that the employer had discriminated against former employees because of their union membership." Pet. App. 35a-37a n.22.

In *NLRB* v. *Spruce Up Corp.*, 529 F.2d 516 (4th Cir. 1975) (Table), and *International Ass'n of Machinists* v. *NLRB*, 595 F.2d 664, 672-676 (D.C. Cir. 1978), cert. denied, 439 U.S. 1070 (1979), the courts upheld the Board's conclusion that the successor firms, having offered jobs to the old company's employees while indicating that terms of employment would be different, were not required to bargain over those initial terms and had acted lawfully in not doing so. Obviously, those cases did not require the Board to formulate a remedy for discriminatory refusals to hire. In sum, the courts that have considered the Board's remedial approach in discrimination cases have unanimously upheld it; the cases cited by petitioners did not address the issue.

c. Petitioners' claim (Pet. 24-27) that the Board's approach in this case will inhibit business transfers is unfounded. Contrary to petitioners' contention

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as "time-barred" a discrimination claim involving only a single employee, who was refused employment because of his union activity, and not, as here, to affect the union's majority status. 549 F.2d at 882. Moreover, the discrimination finding in *Nazareth* had not been the basis for the Board's remedy. Here, in contrast, the court of appeals unanimously *upheld* the finding of unlawful discrimination to avoid bargaining, and it was that finding that served as the linchpin for the Board's remedial order.

(Pet. 26), the Board's approach does not ignore the great "public benefit in preserving the successor's ability to make immediate operating changes," *NLRB* v. *Bachrodt Chevrolet Co.*, 468 F.2d 963, 973 (7th Cir. 1972) (Stevens, J., dissenting), vacated, 411 U.S. 912 (1973), or unduly burden the process of reviving a failing business. A new employer is free to offer its new employees such initial terms as it chooses and to hire whomever it chooses, so long as its hiring decisions are not motivated by antiunion considerations. Only where, as here, the employer unlawfully discriminates against its predecessor's employees does the remedy at issue in this case apply. The holding below does not imperil lawful business transfers; it simply addresses the unique remedial problems raised when an employer, such as U.S. Marine, embarks on a calculated scheme to evade bargaining through discrminatory refusals to hire.

d. Finally, review is not warranted because petitioners' remedial claim is jurisdictionally barred. Although petitioners raised that claim in the court of appeals, petitioners never raised it before the Board. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioners have shown no "extraordinary circumstances" here.

While the Board's remedy in this case granted relief that had not been ordered by the ALJ, petitioners never filed a motion for reconsideration to challenge the Board's decision. That failure constitutes a jurisdictional bar to their current claim. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 454 U.S. 645, 665-666 (1982) (finding court of appeals to be "without

jurisdiction" to consider an issue not raised before the Board by the filing of a "petition for reconsideration" or otherwise); *International Ladies' Garment Workers* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975) (Section 10(e) barred company's challenge because the company had "failed to file a petition for reconsideration" after the Board rendered an unexpected decision).[19]

2. Petitioners contend (Pet. 27-30) that the court of appeals erred in upholding the Board's finding that U.S. Marine engaged in unlawful discrimination. Specifically, they argue that the Board improperly placed the burden on U.S. Marine to show a "convincing rationale" for failing to hire 34 of the former Chrysler employees. That contention, which the court of appeals unanimously rejected, misconceives the burden of proof allocation approved in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983), and ignores the substantial evidence that supports the Board's finding of unlawful discrimination.

In *Transportation Management*, the Court held that, under the Act, the General Counsel of the Board bears the burden of proving by a preponderance of the credible evidence that an employee's union membership or activity was a substantial or motivating

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[19] The court of appeals held that Section 10(e) did not apply here because the remedy issue was presented to the Board by the Board's General Counsel and the Union and because there was no danger of repetitious appeals. Pet. App. 30a n.17. The court of appeals' functional approach to waiving the strict jurisdictional requirement of Section 10(e) conflicts with the mandatory language of the statute and with this Court's unyielding enforcement of it. See *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 & n.10 (1979).

factor in the employer's adverse employment decision. After the General Counsel has made such a showing, however, the employer can avoid liability by showing it would have taken the same action regardless of the forbidden motivation. 462 U.S. at 401. The court of appeals correctly concluded that "[t]here is substantial evidence, both direct and circumstantial, from which the Board could infer that thirty-four of the applicants were not hired because they were union members who formerly had worked for Chrysler." Pet. App. 23a.

The record shows that U.S. Marine told both the Union and Chrysler, before finalizing the sale, that it had no intention of dealing with the Union. It further shows that U.S. Marine falsely inflated the work force figures in order to obtain a basis for claiming that the 223 Chrysler employees already hired did not constitute a majority (and thus there was no obligation to bargain with the Union). The record also shows that, under the falsely inflated work force projection, it was necessary for U.S. Marine to avoid hiring the 34 employees to prevent a bargaining obligation from accruing under the false projection.[20] Finally, U.S. Marine failed to advance any legitimate reasons for its refusal to hire the additional 34 Chrysler employees, who were good employees, were versatile and skilled in various jobs at the plant, had worked at the plant a minimum of ten years, and had work-related characteristics com-

[20] As the Board explained, petitioners' "fabrication of the 460 employment projection figure made it imperative that U.S. Marine hire no more than 230 Chrysler employees"; if the 34 discriminatees had been hired, petitioners would have overshot the majority mark. Pet. App. 69a.

parable to the 223 Chrysler employees who were hired.[21]

There is no merit to petitioners' contention (Pet. 28) that the Board improperly shifted the burden of proof by considering the inadequacy of U.S. Marine's reasons for failing to hire the 34 Chrysler employees "as an element of the General Counsel's *prima facie* case of antiunion discrimination." Nothing in *Transportation Management* supports the view that unlawful motivation must be established solely by independent evidence before the weakness of the employer's explanation can be considered. Indeed, in its *Wright Line* decision, 251 N.L.R.B. 1083 (1980), which enunciated the burden-shifting analysis approved in *Transportation Management*, the Board specifically noted that "[t]he absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case." *Id.* at 1089 n.12, citing *Shattuck Denn Mining Company* v. *NLRB*, 362 F.2d 466 (9th Cir. 1966).

Petitioner's reliance (Pet. 28-29) on *Holo-Krome Co.* v. *NLRB*, 947 F.2d 588 (2d Cir. 1991), is unavailing. The panel decision did state that the Board improperly "considered the weakness of rebuttal evidence * * * to find that the General Counsel established a *prima facie* case." *Id.* at 592. On the Board's petition for rehearing, however, the panel

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[21] Relying on the ALJ's statement that there is "no substantive evidence of why one person was hired and one was not," petitioners suggest (Pet. 27-28) that there can be no determination that U.S. Marine discriminated against the 34 applicants because they were union members who formerly worked for Chrysler. As the court of appeals explained, however, U.S. Marine's "unlawful scheme to avoid a bargaining obligation was furthered by the refusal to hire some of the former Chrysler employees, not by the refusal to hire those specific applicants." Pet. App. 23a n.11.

issued a supplementary opinion recognizing that "[t]o the extent that our opinion faulted the Board for considering the employer's explanation in the assessment of the *prima facie* case, it was thus a shade too broad." *Holo-Krome Co.* v. *NLRB*, Nos. 91-4061, 91-4085 (2d Cir. Jan. 17, 1992), slip op. 14.[22] After an extensive review of the Board's allocation of the burden of proof in discrimination cases, the court of appeals explained that:

> The Board wants the ALJ to make an initial determination as to whether the General Counsel has proved that protected activity was part of the motivation of the employer's conduct. In making that determination, the ALJ may use all of the record evidence. This clearly includes whatever explanation the employer gave to the employees during the episode, and, it apparently also includes the explanation that the employer presented at the hearing. Where the Board draws the line, however, is in the consideration of the employer's affirmative defense [that it would have taken the same action without regard to the improper motive]. That defense is not to be considered until the ALJ has determined that the General Counsel has presented a *prima facie* case. Thus, the employer's explanation *for the action it took* can be assessed in determining whether a *prima facie* case has been shown, but the employer's affirmative defense as to *the action it would have taken if no improper motivation had existed* cannot be assessed until the *prima facie* case has been proven.

Slip op. 10. The court of appeals then disavowed any suggestion that the Board errs when it considers "the

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[22] We have lodged copies of the opinion on rehearing in *Holo-Krome* with the Clerk of this Court.

employer's explanation as elicited by the General Counsel" in determining whether the employer was motivated by an anti-union purpose. The court also made clear that "if the employer elects to offer evidence rebutting the General Counsel's *prima facie* case (whether or not framed as an affirmative defense), the ALJ is entitled to assess the entire record in determining whether the *prima facie* case remains proven." *Id.* at 11-12.[23] In light of the clarifying opinion in *Holo-Krome*, it is readily apparent that there is no conflict in the circuits on this issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[23] The factfinder's consideration of the entire record, including the employer's explanation when offered, is the normal procedure in resolving claims of unlawful discrimination. See *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983); *Hernandez* v. *New York*, 111 S. Ct. 1859, 1866 (1991) (plurality opinion).

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